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H.R. 4353, THE INTERNATIONAL ANTIBRIBERY
AND FAIR COMPETITION ACT OF 1998

BEFORE THE SUBCOMMITTEE ON FINANCE AND HAZARDOUS MATERIALS

HOUSE COMMERCE COMMITTEE

SEPTEMBER 10, 1998

Mr. Chairman and Members of the Committee:

Twenty one years ago, the United States Congress passed the Foreign Corrupt Practices Act, becoming the first country to make it a crime for its citizens and companies to bribe the officials of another country. This was a courageous and farsighted action for our country to take, and one that reaffirmed our leadership in the regulation of international business practices.

Ten years ago, the Congress amended the Foreign Corrupt Practices Act (FCPA), and, more importantly, called upon the Executive Branch to negotiate-with our trading partners at the Organization for Economic Cooperation and Development-an international agreement that would require our trading partners to enact laws similar to our FCPA.

I can attest to the high priority that this Administration has placed on getting the world's largest industrialized economies to adopt strict anti-bribery laws. Our goal has been to bring other countries up to our high standard, and to ensure that our firms would no longer labor under a competitive disadvantage in international trade.

At the Commerce Department, we have focused on the issue of bribery in international business transactions for years. It has also been a major focus of our National Export Strategy. This Convention represents a major component of our strategy to eliminate bribery from international trade.

Now, with the strong support of the business community and members of Congress, both Republicans and Democrats, we have achieved our goal. On December 17 of last year, the United States signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Thirty-three nations have now agreed to enact criminal laws that will follow closely the prohibitions found in our FCPA. Now, the world's largest economies must outlaw the bribery of foreign public officials in international business transactions. This is a major achievement that will provide for a more level playing field for U.S. businesses overseas.

Mr. Chairman, the prevalence of bribery in international transactions has been costly for the United States, for the countries whose officials demand or accept bribes, and also for the countries whose companies pay bribes. Bribery hurts U.S. exporters and suppliers in every state and district in our country. In economies in transition, it hinders economic growth and the development of democracy.

The governments that have signed the Convention have agreed to seek to ratify it and to enact implementing legislation, by the end of this year. But, and I cannot stress this point enough, action on the part of the United States is important. Our leadership has led to the negotiation and signing of the Convention-now our leadership will bring the Convention into effect by spurring our major competitors to ratify and implement it. Our work is cut out for us: we must ensure timely and complete U.S. implementation of the Convention, so that our businesses may reap the benefits of this Convention as soon as possible. Overall, I think that working together we have made tremendous progress, and I look forward to bringing this Convention into effect at the earliest possible date.

Let me briefly go over what this Convention does.

First, the Convention obligates the parties to criminalize the bribery of foreign public officials. This obligation includes bribery of officials in all branches of government, whether appointed or elected, and includes officials of public agencies, public enterprises, and public international organizations.

The parties must apply "effective, proportionate, and dissuasive criminal penalties" to the bribery of foreign public officials. The bottom line for those who bribe will be fines, loss of business, and, in some cases, imprisonment. If a party's legal system does not include the concept of corporate criminal liability, the party must provide for equivalent non-criminal sanctions, including monetary penalties.

The Convention requires that parties be able to seize or confiscate both the bribe and the proceeds of the bribe - the net profits that result from the transaction- or to impose equivalent fines, so as to provide a powerful disincentive to bribery. Under our law, the ability to impose substantial fines has had a significant impact on corporate compliance.

The Convention has strong provisions on mutual legal assistance and extradition. The mutual legal assistance provisions will greatly enhance cooperation with foreign governments in cases of alleged bribery, improving both the enforcement of our FCPA and enforcement by foreign governments of their new antibribery statutes.

Mr. Chairman, while this Convention will go a long way towards leveling the playing field for our businesses, there are some aspects of the bribery problem that we are still discussing with our trading partners. These are the bribery of foreign political parties, party officials, and candidates for political office. Our law covers bribes paid to all of these, but the Convention covers only business-related bribes made through political parties, party officials, and candidates to persons otherwise covered. It also covers bribes that foreign public officials direct to parties, party officials, and candidates. At our urging, OECD members have agreed to discuss these issues on a priority basis in the OECD's antibribery working group. We will take up these issues again at the May 1999 OECD annual ministerial meeting. I am confident that the parties to the Convention will find effective solutions to these remaining issues.

I am proud to say that we have already made significant progress towards bringing the Convention into effect. On July 31, the Senate unanimously passed a resolution of advice and consent to ratification of the Convention. On the same day, the Senate voted approval of implementing legislation that would make the necessary changes to the FCPA to make it fully consistent with the Convention. Mr. Chairman, it is my strong hope that the House will also act quickly on the implementing legislation so that the United States can deposit its instrument of ratification with the OECD.

What to expect from other Parties to the Convention

The greatest impact of our Foreign Corrupt Practices Act over the years has been the business community's own response to the law: they have adopted meaningful internal corporate controls, effective internal and external auditing, and the adoption of codes of conduct. We would expect to see a similar response, when this Convention is implemented, by the business communities of the other Parties to the Convention.

The Convention also provides us, for the first time, with a mechanism to monitor, through regular peer review within the OECD, both the quality of the legislation enacted by other nations, and the effectiveness of their enforcement of their legislation. Regular comprehensive monitoring will provide us with the ability to determine whether other nations actually do what they have agreed to do. I expect that soon after the Convention enters into force, we will begin to see a sharp curtailment in the practice of bribery of foreign public officials in major international business transactions. For the first time, our competitors will have to weigh the risks of bribery against the supposed benefits.

Related initiatives

This Convention is not our only anti-corruption effort. It is the centerpiece of a comprehensive U.S. government strategy to combat bribery and corruption abroad. In our own hemisphere, we successfully concluded the Inter-American Agreement Against Corruption, which has recently been submitted to the Senate for its advice and consent. Three Latin American countries were among the five non- OECD members that have signed the OECD anti-bribery Convention. We

are also working with the International Monetary Fund and multilateral development banks, to encourage those institutions to help countries promote good governments and the rule of law.

In the OECD as well, we are pressing our partners that still allow tax deductibility of bribes to eliminate this unacceptable treatment. Progress is already being made in countries such as Denmark, Norway, and Portugal. This progress on eliminating tax deductibility will be accelerated when the Convention comes into force.

In addition, in May the President unveiled the first ever international crime control strategy. In that strategy it was announced that Vice President Gore will host an international conference on reducing corruption among public officials, including security and justice officials.

We and all signatories to the Convention agreed to seek approval and enactment of implementing legislation by the end of 1998. We believe that it is essential that the United States meet this schedule. Mr. Chairman, the business community in the United States has expressed to me its strong support for our efforts to bring this Convention into effect as soon as possible. If we do not, other countries will use our delay as an excuse to avoid or delay their own implementation. The sooner we act in ratifying the Convention, and enacting our implementing legislation, the sooner others will act. And that will therefore level the playing field on which our companies must compete to obtain business overseas.

Implementing legislation

Mr. Chairman, I would like to explain briefly the provisions of the implementing legislation that is before your Committee, the "International Anti-Bribery and Fair Competition Act of 1998," otherwise known as H.R. 4353.

Since the Convention is very similar to our FCPA, the bill incorporates amendments necessary to bring our law into full compliance with its obligations and to implement the Convention. The proposed amendments are tailored so that our law will have a scope similar to what we expect our major trading partners to achieve as they enact their laws. I would like to emphasize that we have been working very closely with the business community on these issues and therefore have been careful not to put U.S. firms at a competitive disadvantage.

The bill would amend the FCPA to conform to the requirements of and to implement the OECD Convention. First, the FCPA currently criminalizes payments made to influence any decision of a foreign official or to induce him to do or omit to do any act in order to obtain or retain business. The bill would make explicit that payments made to secure "any improper advantage," the language used in the OECD Convention, are prohibited by the FCPA.

Second, the OECD Convention calls on parties to cover "any person." The current FCPA covers only issuers with securities registered under the 1934 Securities Exchange Act and "domestic concerns." The bill would, therefore, expand coverage to include all foreign persons who commit an act in furtherance of a foreign bribe while in the United States.

Third, the OECD Convention includes officials of public international organizations within the definition of "public official." Accordingly, the bill similarly expands the FCPA definition of public officials to include officials of such organizations.

Fourth, the OECD Convention calls on parties to assert nationality jurisdiction over offenses committed abroad when consistent with national legal and constitutional principles. Accordingly, the bill would provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States.

Fifth and finally, the bill would amend the penalties applicable to employees and agents of U.S. businesses to eliminate the current disparity between U.S. nationals and non-U.S. nationals employed by or acting as agents of U.S. companies. In the current statute, such non-U.S. nationals are subject only to civil penalties. The bill would eliminate this restriction and subject all employees or agents of U.S. businesses to both civil and criminal penalties.

With respect to potential impacts on the criminal justice system, the bill imposes new criminal penalties on two classes of persons: (a) foreign nationals employed by or acting as agents of U.S. companies, and (b) foreign nationals and foreign companies that engage in unlawful acts in the United States. In addition, the liability of U.S. persons is expanded to the extent that unlawful acts taken wholly outside the United States will now result in the same penalties as those taken within the United States under the existing statute.

H.R. 4353 also includes several provisions relating to the status of certain international telecommunications organizations under the FCPA and to the privileges and immunities afforded to such organizations. We would be concerned about provisions that would cause controversy that could delay passage of this critical legislation implementing the Anti-Bribery Convention. However, we have had several conversations with the Committee staff regarding these provisions and, with certain technical changes that we have discussed, we would accept these telecommunications provisions.

Conclusion

In conclusion, the successful culmination and conclusion of this OECD Anti-Bribery Convention has been a genuine bipartisan effort, spurred by the Congress over the past 10 years, and one that several administrations have given priority to. I welcome the Committee's interest in this important issue, and I urge you to take action to approve implementing legislation for the OECD Convention, and to ensure that the benefits of the Convention are realized rapidly, so that our own companies can at last conduct their business on a more level playing field. Thank you again, and I am pleased to answer any and all questions.